AUG 14 2003

No. 03-90

IN THE

Supreme Court of the United States

FRED URANGA,

Petitioner,

v.

FEDERATED PUBLICATIONS, INC.
dba The Idaho Statesman,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

BRIEF IN OPPOSITION

W. HUGH O'RIORDAN
Counsel of Record
DEBORA K. KRISTENSEN
GIVENS PURSLEY LLP
277 North 6th Street
Suite 200
Boise, Idaho 83702
(208) 388-1200

Attorneys for Respondent

August 14, 2003

182430

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Consistent with settled First Amendment and common law protections, may a newspaper be sued for invasion of privacy for publishing a court record that has been open to the public for 40 years?

STATEMENT PURSUANT TO RULE 29.6

Respondent Federated Publications, Inc. is a wholly-owned subsidiary of Gannett Co., Inc.

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Respondent Federated Publications, Inc., dba *The Idaho Statesman* ("*The Statesman*"), respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Fred Uranga ("Uranga").

STATEMENT OF THE CASE

This Petition arises from the final judgment of the Idaho Supreme Court affirming the unanimous decision of the Idaho Court of Appeals, which affirmed the Idaho Fourth Judicial District Court's grant of summary judgment dismissing Uranga's claims for invasion of privacy and reckless infliction of emotional distress.

The Statesman published the statement giving rise to Uranga's lawsuit in the course of a public debate on a proposed ballot initiative to adopt a state constitutional amendment that would have restricted the rights of Idaho's gay citizens. (App. 42, 68.) To bring historical perspective, *The Statesman* published a news report on the 1955-56 "Boys of Boise" investigation, during which police interrogated 1,500 individuals and arrested 16 for alleged homosexual conduct. (App. 41-42.) The newspaper included in its report an exact reprint of a handwritten sworn statement that identified Uranga as an individual who had been involved with Frank Jones, a subject of the investigation. (App. 2-3.) The statement was filed with the Clerk of the Idaho Fourth District Court as part of the court record of Case No. 2203, and has been open to the public since. (App. 7, 17.)[1]

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1. "App." refers to the Appendix filed by Petitioner.

The Idaho Supreme Court held that *The Statesman* could not be sued for damages "for accurately publishing a document contained in a court record open to the public." (App. 14.) The Court reasoned that (a) the statement had been made part of an official court file; (b) court files are open to the public for inspection and copying pursuant to Idaho Court Admin. R. 32(c)(4); (c) *The Statesman* did not obtain the document by improper means; and (d) *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), which held that the First Amendment "will not allow exposing the press to liability for truthfully publishing information in official court records," required dismissal of Uranga's claims. (App. 7-15.)

The Idaho Supreme Court set aside its earlier opinion, which held that Uranga's lawsuit could proceed because the published statement related to a decades-old judicial proceeding, and because the publication lacked "newsworthiness." (App. 26, 34-35.) The earlier opinion had announced a doctrine that would have made Idaho the only state in the nation to impose tort liability for accurate reports of the contents of official court records. On rehearing, the Idaho Supreme Court properly rejected that aberrant view of the law, and held that *The Statesman*'s publication was protected by the First Amendment and nationally-recognized limits on the tort of invasion of privacy. (App. 14.)

SUMMARY OF ARGUMENT AND REASONS FOR DENYING THE WRIT

This case involves an issue of settled law over which there is no dispute among the Circuits or the states. The Idaho Supreme Court's final judgment followed the prior decisions of this Court, which uniformly hold that the First Amendment

protects the press from liability for invasion of privacy for accurately publishing the contents of public records. Fundamentally, Uranga fails to distinguish these authorities, but instead proposes a vague and unworkable "newsworthiness" test that violates the First Amendment. In short, the judgment below raises no issues that warrant Supreme Court review, and Uranga's Petition should be dismissed.

ARGUMENT

I. THIS CASE INVOLVES AN ISSUE OF WELL-SETTLED FIRST AMENDMENT LAW.

The Idaho Supreme Court based its final judgment on the established First Amendment rule that the publication of information placed in open court files cannot form the basis of a cause of action for invasion of privacy. This rule was adopted in *Cox* and expanded in *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989).

In *Cox*, this Court held that the First Amendment barred a cause of action for damages for invasion of privacy caused by the publication of a rape victim's name, when the victim's name was revealed in a public judicial record. 420 U.S. at 494-96. The Court observed that the freedom of the press to publish public record information is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." 420 U.S. at 495. The Court expressly declined to "make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man." *Id.* at 496. Such a rule would "invite timidity and self-censorship" that "very likely would lead to the suppression of" items that should be covered by the press. *Id.* Based on

these concerns, the Court held that "*[a]t the very least*, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* (emphasis added).

In *Florida Star*, the Court extended this rule to police reports and other nonjudicial records, noting that a different standard would subject the press to precisely the kind of self-censorship and "overdeterrence" *Cox* sought to avoid. *Florida Star*, 491 U.S. at 535. Additional Supreme Court decisions have recognized that *Cox* sweeps broadly to protect the publication of the contents of public records. *E.g.*, *Landmark Communications v. Virginia*, 435 U.S. 829, 840 (1978).

The rule of *Cox* and *Florida Star* has been consistently followed by the overwhelming majority of lower courts, which recognize that the publication of private information contained in public records *cannot* give rise to liability for invasion of privacy. *See, e.g.*, *Willian v. Columbia County*, 280 F.3d 1160 (7th Cir. 2002) (plaintiff had no privacy interest in information contained in FBI records of his 18-year-old burglary conviction); *Romaine v. Kallinger*, 537 A.2d 284, 293 (N.J. 1988) (First Amendment protects publication of hostage-taking events that occurred eight years earlier); *Montesano v. Donrey Media Group*, 668 P.2d 1081, 1088 (Nev. 1983) (publication of plaintiff's 23-year old juvenile conviction not actionable because "all the information disclosed was contained in public records"); *Kilgore v. Younger*, 640 P.2d 793 (Cal. 1982) (defendants could not be found liable for invasion of privacy for publication of plaintiff's name implicating him as one among 92 people included in attorney general's public report

regarding organized crime); *McCormack v. Oklahoma Publ'g Co.*, 613 P.2d 737, 739 (Okla. 1980) (publication disclosing that plaintiff "has been listed by the Justice Department as an organized crime principal subject, a listing usually reserved for Mafia members and their associates," could not support a privacy claim because facts were disclosed in public records); *Hogan v. The Hearst Corp.*, 945 S.W.2d 246 (Tex. Ct. App. 1997) (publication of article identifying an alleged sex offender, based on arrest records generated before criminal proceedings had begun, cannot support privacy action under the First Amendment).

Similarly, the *Restatement (Second) of Torts* recognizes that an action for invasion of privacy cannot lie "when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record." *Restatement (Second) of Torts* § 652D comment b. (*See* App. 10.)

Following this well-established body of law, the Idaho Supreme Court rightly affirmed the dismissal of Uranga's suit against *The Statesman* for its accurate publication of an official court record.

Uranga has identified no split of authority, either among any United States Courts of Appeal or any state courts of last resort, regarding the First Amendment and common law protections applied by the Idaho Supreme Court here. *See* Supreme Court Rule 10(b). Likewise, he has not identified a pertinent issue of federal law that has not been addressed by this Court or that conflicts with any relevant decisions of this Court. *See* Supreme Court Rule 10(c). Lacking any compelling basis for review, his Petition for Writ of Certiorari should be denied.

II. URANGA HAS NOT MATERIALLY DISTINGUISHED *COX*.

While Uranga asserts that *Cox* is distinguishable, he has failed to identify any material differences between this case and *Cox* or the additional authorities discussed above.

Uranga first asserts that this case is different because it involves the publication of allegedly false information. (Pet., at 9.) But *Cox* is not limited to the publication of incontrovertibly true information, and it cannot be distinguished on this ground. *Cox* holds that the First Amendment protects the truthful — *i.e.*, accurate — republication of information that has been released to the public in official court records. 420 U.S. at 496 ("*At the very least*, the First and Fourteenth Amendments will not allow exposing the press to liability for *truthfully publishing* information released to the public in official court records.") (emphasis added). *Florida Star* expanded that protection to police reports and other government records — without requiring the media to verify independently the truthfulness of information contained in such reports. 491 U.S. at 536.[2]

Uranga also suggests that *Cox* is distinguishable because the statement published by *The Statesman* was not "used in any judicial proceeding. . . ." (Pet., at 13-14.) *Cox* and *Florida Star* have never been limited to materials used in court proceedings. Rather, this Court has emphasized that the First Amendment applies to reports of all public records,

2. *See* App. 50 (Idaho Court of Appeals Opinion) ("A rule that the press must independently verify all allegations found in a court record before publishing the information would create the sort of chilling effect on press coverage that the United States Supreme Court has consistently admonished against.").

judicial or otherwise. *See Cox*, 420 U.S. at 496 (announcing the Court's "reluctan[ce] to embark on a course that would make *public records* generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man") (emphasis added); *Florida Star*, 491 U.S. at 532 (First Amendment protects report of information from a police report generated before criminal proceedings had begun or a suspect identified).[3]

III. URANGA'S "NEWSWORTHINESS" TEST VIOLATES THE FIRST AMENDMENT.

Finally, Uranga's flawed proposal for the adoption of a vague "newsworthiness" standard does not merit consideration by this Court. (*See* Pet., at 8.) In *Florida Star*, the Court held that liability may be imposed on a newspaper for the truthful publication of a lawfully-obtained public record "only when narrowly tailored to a state interest of the

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3. *See also Boettger v. Loverro*, 587 A.2d 712 (Pa. 1991) (First Amendment protected publication of wiretap transcripts that had been placed in court's open, public file in a case that was never tried); *Wright v. Grove Sun Newspaper, Inc.*, 873 P.2d 983, 985 (Okla. 1994) (report of affidavit and transcript discussing possible drug investigation protected by First Amendment); *Kilgore*, 640 P.2d at 797 (report named plaintiff as an organized crime suspect); *McCormack*, 613 P.2d at 739; *Hogan*, 945 S.W.2d at 250 (publication identified suspected sex offender based on arrest records). *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 139 Cal. App. 3d 118 (Cal. Ct. App. 1983), cited by Uranga on page 14 of his Petition, is inapposite. In *Diaz*, the court reversed a verdict that the defendants had violated a transsexual's right to be free from disclosure of private facts. While the court recognized that the defendants could be held liable for reports based on confidential sources, the defendants' potential liability did *not* arise from their use of a public record that failed to identify the plaintiff's new name or gender. 139 Cal. App. 3d at 132.

highest order. . . ." *Florida Star*, 491 U.S. at 541. Uranga's "newsworthiness" standard does not meet this test because (1) Uranga has failed to establish a state interest of the highest order in protecting whatever remaining privacy interests he might have in the public court record reproduced by *The Statesman*; and (2) the open-ended "newsworthiness" standard is not narrowly tailored to advancing any such interest.

First, Uranga's attenuated interest in protecting the privacy of information that has been open to the public without restriction for four decades is not a "state interest of the highest order." *Id. See Cox*, 420 U.S. at 495-96 ("the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record"); *Montesano*, 668 P.2d at 1084-85 ("The courts have universally recognized that, for purposes of the tort of invasion of privacy, materials properly contained in a court's official records are public facts."); *Restatement (Second) of Torts* § 652D comment b ("There is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public.").

Second, imposing liability on *The Statesman* for publicizing matters from an open court file is not a narrowly tailored means of protecting Uranga's privacy. As this Court has recognized:

> [P]unishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act. . . . [W]here the government has made certain

> information publicly available, it is highly anomalous to sanction persons other than the source of its release.

Florida Star, 491 U.S. at 535.

Third, a "newsworthiness" test would provide publishers with little guidance regarding when the accurate publication of a lawfully-obtained public record might expose them to liability. A test based on undefined and ever-shifting concepts as "community mores" cannot be "narrowly tailored" to further a compelling state interest. *Florida Star*, 491 U.S. at 541. *See Cox*, 420 U.S. at 496 (declining to adopt a standard based on "the sensibilities of the supposed reasonable man").[4]

At bottom, Uranga's Petition is nothing more than a call on this Court to deviate from the well-settled constitutional doctrine that governs this case.

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4. None of the cases cited by Uranga on page 16 of his Petition in support of the "newsworthiness" test involved the publication of information from public records. *See Robert C. Ozer P.C. v. Borquez*, 940 P.2d 371 (Col. 1997) (member of law firm informed colleagues that an employee was involved in a homosexual relationship); *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975) (discussing invasion of privacy claim based on publication of facts that the plaintiff provided to the defendant); *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981) (publication of information about plaintiff's psychiatric history and marital life held privileged under the First Amendment; source of facts not considered by the court).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. HUGH O'RIORDAN
Counsel of Record
DEBORA K. KRISTENSEN
GIVENS PURSLEY LLP
277 North 6th Street
Suite 200
Boise, Idaho 83702
(208) 388-1200

Attorneys for Respondent

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